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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. 402

In The Matter of
Rosenberg Iron & Metal Co., Inc.,

Bankrupt.

DEMPSTER BROTHERS, INC.,

Petitioner

vs.

MILTON M. COHN, Trustee in Bankruptcy,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on February 5, 1965, and on April 30, 1965.

OPINIONS BELOW

The opinion of the District Court (A.App., pp. 16-26) is reported at 228 F. Supp. 12 (1964). The opinion of the Court of Appeals, which is reprinted in Appendices A and B hereto, pp. 18-24, is reported in 343 F. 2d 527 (1965).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 30, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a trustee in bankruptcy under Section 70(c) of the Bankruptcy Act has the authority to take possession of personal property wherein the vendor has reserved title to said personal property under a conditional sales contract when there exists no creditor who on date of bankruptcy could have obtained a lien by legal or equitable proceedings at the date of bankruptcy.

2. Does a State Circuit Court Restraining Order issued June 27, 1961, restraining all creditors from proceeding against the property of the bankrupt remain in full force and effect until the moment of the filing of an involuntary bankruptcy in Federal Court, and whether such Restraining Order removes any creditor from obtaining a lien by legal or equitable proceedings at the date of bankruptcy, October 18, 1961?

3. Who has the burden of proof — the trustee or the conditional sales vendor — of establishing whether or not there existed a creditor during a period of non-recordation, who had no notice of the vendor's reservation of title as is set forth in Wisconsin Statutes Section 122.05?

STATUTES INVOLVED

Sec. 70(c) U.S.C.A. Title 11, Par. 110(c) (A. App. p. 41).

Wisconsin Statutes, §122.05. Conditional sales void as to certain persons (A. App. p. 41).

Wisconsin Statutes, §122.11 Renewal (A. App. p. 41).

STATEMENT

On May 20, 1958, Rosenberg Iron & Metal Company, the Bankrupt, purchased from Dempster Brothers, Inc., your Petitioner, one certain baling press for $94,018.75, of which $23,504.95 was paid down, leaving a balance of $70,513.80 as a balance secured on a conditional sales contract. The conditional sales contract was filed with the Register of Deeds of Milwaukee County on June 19, 1958, as Document Number 1705265. Under date of June 27, 1961, Rosenberg Iron & Metal Co. made a voluntary assignment of assets to a Receiver in the Circuit Court of Milwaukee County, State of Wisconsin, under the provisions of Chapter 128, Wisconsin Statutes so made and provided.

Under date of June 27, 1961, the Honorable ELMER ROLLER, Circuit Court Judge for Milwaukee County, issued a restraining order (A. App. p. 29) which, among other things, enjoined and restrained all creditors from commencing or prosecuting any proceedings until further order of the Court.

Dempster Brothers, Inc. did not refile its conditional sales contract for renewal at the completion of the three year period after June 19, 1958, as set forth in Wisconsin Statute Section 122.11 (A. App. p. 41).

On October 18, 1961, certain creditors of Rosenberg Iron & Metal Co. filed an involuntary petition in bankruptcy in the Federal District Court for the Eastern District of Wisconsin, which, in effect, transferred the Rosenberg Iron & Metal Co. case from the Circuit Court of Milwaukee County to the Federal Court.

On December 15, 1961, Dempster Brothers, Inc. filed a petition of reclamation (A. App. p. 3) in the Bankruptcy Court to take back the baling press which the Trustee in Bankruptcy had in his possession.

The Referee in Bankruptcy issued a decision (A. App. p. 6-12) which, in effect, ruled that Dempster Brothers, Inc. had no lien on the baling press under the conditional sales contract because Dempster Brothers, Inc. had not refiled or renewed its conditional sales contract at the end of the three year period as provided in Section 122.11 Wisconsin Statutes (A. App. p. 41).

A Petition for Review to the Federal District Court for the Eastern District of Wisconsin was heard before the Honorable KENNETH GRUBB, and that affirmed the decision of the Referee (A. App. p. 16-26).

A timely appeal was filed with the Circuit Court of Appeals for the Seventh Circuit, and after argument, the Circuit Court of Appeals affirmed the decision of the Federal District Court.

REASONS FOR GRANTING THE WRIT

1. **In the opinion of your Petitioner, the Circuit Court of Appeals for the Seventh Circuit did not follow the ruling set forth in Lewis v. Manufacturers National Bank of Detroit, 81 S. Ct. 347 (1961).**

In the *Lewis* case we find a trustee attempting to do the exact same thing the trustee in the case at bar is at-

tempting to do. The facts disclosed that the bankrupt in the *Lewis* case borrowed money from the defendant-respondent on November 4, 1957, giving a chattel mortgage as security on an automobile, and the chattel mortgage was recorded in the Register of Deeds Office on November 8, 1957.

On April 18, 1958, the borrower filed a voluntary petition in bankruptcy, and the plaintiff was appointed trustee. The trustee brought an action before the Referee in Bankruptcy to void the chattel mortgage of the defendant on the basis that during the period of non-recordation, that is, November 4th to November 8th, the hypothetical creditor could have stepped in and attached the property, which attachment would be superior to that of the defendant, and the trustee argued that since he is the "perfect creditor" he can step in and void the chattel mortgage. The referee ruled that the trustee was, under Section 70(c), "clothed with rights of a creditor who could have obtained a lien on the date of bankruptcy whether or not such a creditor existed."

The defendant lendor asked for a review in the District Court, and the District Court reversed the referee and the Court of Appeals affirmed the District Court in 275 F. 2d 454. The case came before the United States Supreme Court and Justice Douglas stated on page 349:

> "We think that one consistent theory underlies the several versions of §70, sub. c which we have set forth, viz., that the rights of creditors — whether they are existing or hypothetical — to which the trustee succeeds are to be ascertained as of 'the date of bankruptcy', not at an anterior point of time. That is to say, the trustee acquires the status of a creditor as of the time when the petition in bankruptcy is

filed. We read the statutory words 'the rights * * * of a creditor (existing or hypothetical) then holding a lien' to refer to that date.

This construction seems to us to fit the scheme of the Act. Section 70, sub. c enables the trustee to set aside fraudulent transfers which creditors having probable claims could avoid. The construction of §70, sub. c which petitioner urges would give the trustee power to set aside transactions which no creditor could void and which injured no creditor. That construction would enrich unsecured creditors at the expense of secured creditors, creating a windfall merely by reason of the happenstance of bankruptcy."

In the case at bar, there existed no creditor who could have, on October 18, 1961, the date of bankruptcy, obtained a lien by legal or equitable proceedings due to the fact that the Circuit Court restraining order was in full force and effect, which enjoined and restrained all creditors from proceeding against the Rosenberg Iron & Metal Co. property.

The trustee in the case at bar is attempting to reach back to the period of June 19, 1961, to June 26, 1961, and claim that during this eight day period of non-recordation a creditor of Rosenberg Iron & Metal Co. could have obtained a lien and, therefore, the trustee on October 18, 1961, the date of bankruptcy, is clothed with the power of such a creditor and his status as of June 19, 1961, to June 26, 1961.

This position advocated by the trustee and approved by the Circuit Court of Appeals is contrary to the holding in *Lewis v. Manufacturers National Bank of Detroit*, 81 S.Ct. 347.

2. **There is a conflict in this point of law between the Circuit Court of Appeals for the Seventh Circuit and the United States Court of Appeals for the Ninth Circuit.**

The Ninth Circuit Court case is found in *Pacific Finance Corporation v. Edwards,* 304 F. 2d 224 (1962). In *Pacific Finance* we find that an automobile was sold on November 10, 1959, to Myers on a conditional sales contract, and the contract was assigned to the plaintiff. A mutual mistake of the parties to said conditional sales contract dated the contract October 10, 1959, but the true date of its execution was November 10, 1959. Said conditional sales contract was properly filed with the County Auditor of King County on November 12, 1959. On February 16, 1960, the wife of the bankrupt entered into a conditional sales contract with one McKale for the purchase of certain supplies and accessories for a 1955 Plymouth automobile, which car was the community property of the bankrupt and his wife.

That at the time of filing the petition in bankruptcy, the amount due McKale had not been paid.

The law in the State of Washington on conditional sales contracts provides that such reservation of title is void against subsequent creditors of the conditional vendee if there is a failure to file a memorandum of the sale within ten days after taking possession of the property by the vendee and the decisions of the Supreme Court of Washington preclude reformation of such contract on the grounds of a mutual mistake so as to effect the rights of bona fide subsequent general creditors. The Ninth Circuit Court stated that its problem was, page 228:

> "Does §70, sub. c vest a trustee as of the date of bankruptcy with all the rights, remedies, and powers of a creditor then holding a lien on the property of the

bankrupt by legal or equitable proceedings, whether or not such a creditor actually exists, in the absence of a creditor of the bankrupt who could have obtained a lien on such property at the date of bankruptcy.

"We have reached the conclusion that the answer to the question must be in the negative and that the order of the District Court confirming the Referee's order in the instant case must be reversed.

"Under its plain language, §70, sub. c applies only where there is property, whether or not coming into the possession or control of the Court, 'upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, * * *.'

"We believe that the word 'creditor' in the foregoing quoted language means an *actual* creditor. Such construction is confirmed by the remainder of §70, sub. c which provides that the trustee 'shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists.' The clause 'whether or not such a creditor actually exists' refers only to a 'creditor then holding a lien thereon.' Under our construction of §70, sub. c the Trustee is empowered to exercise the powers given him even if no actual creditor has obtained a lien, but he cannot do so if no actual creditor could have obtained a lien."

The Ninth Circuit Court then reviewed the effect of the Supreme Court's decision in the *Lewis* case, and further stated at page 229, (bottom of page):

"When the statute was last amended, in 1952, there was inserted for the first time, the qualifying language 'upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy.' We find nothing in

these changes, or in the legislative history, indicating an intent on the part of Congress to penalize the security holder by giving to the trustee the status of a hypothetical creditor holding a lien at the date of bankruptcy in instances where there existed no actual creditor who could have obtained a lien on the property of the bankrupt by legal or equitable proceedings at such date."

The Seventh Circuit Court in the case at bar, has ruled that notwithstanding the fact that no creditor of the bankrupt on the date of bankruptcy, to-wit, October 18, 1961, could have obtained a lien by legal or equitable proceedings due to the fact of Milwaukee County Circuit Court restraining order, the trustee was permitted to reach back to the area of June 19, 1961, to June 26, 1961, and come forward with a creditor at this anterior date who could have obtained a lien on the bankrupt's property.

3. The Seventh Circuit Court failed to apply Wisconsin law as to the effect of Section 122.05 Wisconsin Statutes.

Wisconsin Statutes 122.05 (A.App. p. 41) provides in effect that a conditional sales vendor's reservation of title in personal property "shall be void as to any purchaser from or creditor of the buyer, who, without notice of such provision, purchases the goods or acquires by attachment or levy a lien upon them before the contract or copy thereof shall be filed, as provided in this chapter . . ."

It is undisputed that Dempster Brothers, Inc. filed its contract at the Register of Deeds Office of Milwaukee County, as is provided by Wisconsin law, on June 18, 1958. It is also undisputed that Dempster Brothers, Inc. failed to refile its conditional sales contract after the three year period, as is provided in Section 122.11 (A.App. p. 41).

The failure to refile the contract on June 19, 1961, is fatal as to the reservation of title only to those creditors as provided in Section 122.05 who were without notice of such reservation of title.

The Supreme Court of the State of Wisconsin in *Commercial Credit Corporation v. Schneider,* 265 Wis. 264 (1953) has, in effect, found that once a conditional sales vendor has properly placed his contract on file at the Register of Deeds Office, this is constructive notice and actual notice to the whole world. Justice Fairchild of the Wisconsin Supreme Court stated on page 266:

> "Ch. 122, Stats., deals fully and wholly with the subject of conditional sales contracts and liens thereunder. When a lien holder under a conditional sales contract has properly and seasonably filed his contract, the provision in the contract reserving the property in him is valid as to all persons for the reason that by so filing the contract he has given constructive notice to the world of his rights in the property.
>
> " 'Where a conditional sales contract is required by statute to be filed or recorded and it is filed or recorded in the proper time, place, and manner, the record operates as constructive notice of the contract, of its provisions, and of the true ownership of the property. . . The constructive notice afforded by the record is the equivalent of actual notice. It is frequently said that the record operates as constructive notice to "all the world!" ' 47 Am. Jur., Sales, P. 119, sec. 911."

The trustee in the case at bar has established that five creditors had done business with the bankrupt between June 19, 1961, and June 26, 1961, and such creditors had not been paid for their transactions. The record establishes that Allis-Chalmers (A. App. pp. 35-36) had been

doing business with the bankrupt from March 2, 1961, through July 5, 1961, during a period which Allis-Chalmers had notice and knowledge that Dempster Brothers, Inc. had a reservation of title on the baling press in question. Therefore, Allis-Chalmers could not fit itself into the category as provided in Section 122.05 Wisconsin Statutes as being a creditor "who, without notice of such provision, purchased the goods or acquired by attachment or levy a lien upon them."

Hein-Werner Corporation also did business with the bankrupt between June 19, 1961, and June 26, 1961, for which they were not paid for their services. The record reflects that Hein-Werner (A. App. pp. 39-40) did business with the bankrupt from January 20, 1961, through June 27, 1961. Therefore, Hein-Werner Corporation could not fit itself into the category of being a creditor without notice as is provided in Section 122.05 Wisconsin Statute.

The Referee in Bankruptcy in his findings of fact (A. App. p. 7, bottom of page), stated:

> "During the period between June 18, 1961, the three year expiration date of the conditional sales contract and June 28, 1961, the date of the execution of the voluntary assignment for the benefit of creditors — Allis-Chalmers Manufacturing Co., one A. Terkel, Hein Werner Corp. and National Salvage Co. sold goods to Rosenberg on credit and these debts remain unpaid and all of said parties were creditors of Rosenberg prior to June 18, 1961."

Therefore, under the Wisconsin law as set forth in *Commercial Credit Corporation v. Schneider,* 265 Wis. 264, these four creditors who had been doing business with the bankrupt during the period that Dempster Brothers, Inc.'s reservation of title was absolutely good,

all such creditors had actual and constructive notice of the reservation of title, and none could fit themselves into the category of being creditors "who, without notice of such provision, purchases the goods or acquires by attachment or levy a lien upon them," and after the effective date of the Circuit Court restraining order, none of these creditors could have proceeded to obtain a "lien by legal or equitable proceedings" as is required in Section 70(c) of the Bankruptcy Act.

Since there existed no creditor on the date of bankruptcy, to wit, October 18, 1961, who could have obtained such a lien by legal or equitable proceedings, the trustee has no claim on the subject baling press.

There remained a fifth creditor, Industrial Salvage and Material Co., who did business with the bankrupt between June 18, 1961, and June 26, 1961. Before the Referee in Bankruptcy, there was no testimony as to whether or not that creditor had done business with the bankrupt prior to June 18, 1961. The question arises who has the burden of proof to come forward in the hearing before the referee to establish that Industrial Salvage and Material Co. did or did not have notice to Dempster Brothers, Inc.'s reservation of title.

In the decision before the District Court for the Eastern District of Wisconsin, the Honorable KENNETH GRUBB ruled that the Petitioner, Dempster Brothers, Inc. had the burden of proof to establish that Industrial Salvage and Material Co. had no notice of Dempster Brothers, Inc.'s reservation of title. This decision was affirmed by the Circuit Court of Appeals for the Seventh Circuit.

The Federal District Court for Wyoming arrived at a contrary decision in this matter as to who has to sustain

the burden of proof. In *In Re Douglas Lumber Company,* F. D. C. 2 F 2d 985 (1924), the Court stated on page 986:

> "The notice so far as a trustee is concerned, undoubtedly means the notice to the creditor, as he stands as a representative of the creditor in a bankruptcy proceedings. This is illustrated in the case of *In Re Basemore* (D.C.) Alabama, 189 F 236, where the court stated:
>
> " 'If all the creditors of the bankrupt had actual notice of the conditional sales, the trustee would represent no class as to which the conditional sales contract would be void since actual notice removes the necessity of showing constructive notice.'
>
> "Upon whose shoulders rests the burden of proof as to actual notice has been determined by the Supreme Court of this State in a consideration of the Wyoming Statute in the case of *Crumvine vs. Reynolds,* 13 Wyo. 111, 78 P. 402, where the court says: 'When a party seeks to appropriate the property of a conditional vendor to the payment of the debt of the conditional sales vendee, he must show that he is within the terms of the Statute giving such right. He must show that he did not have notice of the vendor's lien.'
>
> "It is therefore apparent in this case that the burden was upon the trustee to establish the fact that the creditors were without notice, which burden has, however, been assumed by the trustee, in that it appears by the stipulation of facts that some of the creditors of the bankrupt had no actual notice of the property rights claimed by the claimant and no notice whatever other than what may have been imported in the nature of a constructive notice by the filing of the conditional sales contract with the affidavit attached to the 1921 contract."

The doctrine set forth in the *Douglas Lumber Company* case was adopted in toto by that renowned Judge

of the Circuit Court of Appeals for the Second Circuit, the Honorable Learned Hand, in his concurring opinion of *In Re Masters Knitting Corporation,* 7 F 2d 11 (1925). In the *Masters* case the petitioner sold machinery to Masters Corp. on a conditional sales contract, but the contract was never recorded. (New York had the same Uniform Sales Contract Law as is in effect in Wisconsin.) Masters Corp. went into bankruptcy, and Petitioner filed a reclamation petition. The referee allowed the claim of the Petitioner to retake his machinery, and the District Court affirmed. The Circuit Court of Appeals reversed it but on the basis that the lower court had applied the wrong statute.

Judge Learned Hand stated, concerning the burden of proof, at page 12:

> "I agree that the case should be reversed because it was clearly tried under a misunderstanding of the Statute and because the point as to burden of proof was not raised in season, but it seems to me that the burden of proof should be upon the trustee. Prima facie, the conditional seller shows title though it is void by Statute against a creditor who attaches without notice if the bill of sale is not filed. Such a Statute seems to me to create a defense, although analogous to that of a bona fide purchaser. So far as I know, that has always been held to be matter which must be proven affirmatively. *Perhaps if the trustee shows that any creditor was without notice, the sale might be void as to all, but it does seem to me that he must show at least as much as that.* Under the rule laid down by my brothers, unless the conditional seller shows that all the creditors had notice he loses, and it will usually be impossible in practice to prove so much. Judge Kennedy seems to me to have stated the correct rule in this respect in *In Re Douglas Lumber Company,* D. C. 2 F 2d 985." (Emphasis supplied)

As Judge Learned Hand has stated, it will be impossible for a petitioner like Dempster Brothers, Inc. to come forward and show that everyone in the world had notice of the lien when he doesn't even know who has been doing business with the bankrupt during the period of non-recordation. It seems more logical that Dempster Brothers, Inc. came forward and showed its conditional sales contract which was part of the proceedings before the Referee in Bankruptcy, and this instrument shows on the face of the document that Dempster Brothers, Inc. reserved title in the baling press. The State of Wisconsin has established without doubt that Dempster Brothers, Inc. does not per se lose its reservation of title when the three year period is up and petitioner did not refile. Section 122.05 Wisconsin Statute refers only to creditors who have purchased property, levied or attached property, and who had no notice of Dempster Brothers, Inc.'s reservation.

As indicated above, the Referee in Bankruptcy found that Allis-Chalmers, A. Terkel, Hein-Werner, and National Salvage Company all had done business with Rosenberg Iron & Metal Company prior to June 18, 1961, and, therefore, all had constructive notice and therefore actual notice of Dempster Brothers, Inc.'s reservation of title in the subject baling press. Therefore, none of these four companies could have come forward between June 18, 1961, and June 26, 1961, and established as a "purchaser from or creditor of the buyer who, without notice of such provision purchases the goods or acquires by attachment or levy a lien upon them," as is required in Section 122.05 Wisconsin Statute.

As to the fifth creditor who rendered services to the bankrupt between June 18, 1961, and June 26, 1961, to wit, Industrial Salvage and Material Company, the trus-

tee brought forth no evidence that such company did not have notice of such reservation of title so as to establish that creditor as one of the classifications as set forth in Section 122.05 Wisconsin Statutes.

The Circuit Court of Appeals for the Seventh Circuit also failed to take into consideration the Wisconsin Supreme Court's interpretation of the term "creditor" as set forth in *In Re Adams Machinery Inc.*, 20 Wis. (2d) 607, 123 N.W. (2d) 558 (1963). In the *Adams* case, Chief Justice Currie has gone into the Wisconsin law as to its interpretation of the word "creditor" as set forth in Wisconsin Statute Sec. 241.11 (Renewal of Chattel Mortgage) at p. 620:

> "The court has held in considering the provisions of sec. 241.11, Stats., dealing with the renewal of the filing of chattel mortgages, that the word 'creditors' in such statute is limited to creditors who after the filing has ceased to be good have acquired liens upon the property. *Graham v. Perry* (1929), 200 Wis. 211, 215, 288 N.W. 135, 68 A.L.R. 267; *Ullman v. Duncan* (1890), 78 Wis. 213, 217, 47 N.W. 266; and *Lowe v. Wing* (1882), 56 Wis. 31, 33, 13 N.W. 892. This holding is in accord with decisions from other jurisdictions. Anno. 51 A.L.R. 591, 598. The same interpretation has been placed upon the word 'creditors' by most courts in construing conditional sales filing statutes. 2 Williston, Sales (rev. ed.), p. 277, sec. 327a."

It is provided in 2 Williston Sales, p. 277, sec. 327a, as follows:

> "Under the construction put upon most statutes, creditors will not prevail over the seller's title unless prior to filing or re-registration thereof, they have acquired a judgment lien or levied an attachment or execution on the goods."

Therefore, in comparing the language set forth in Williston and the doctrine adopted by Wisconsin in the *Adams* case, we re-examine sec. 122.05, Wisconsin Statutes, and we find that your Petitioner's reservation of title is only void as to creditors of Rosenberg Iron & Metal Company who, without notice of such reservation of title have acquired by attachment or levy a lien upon the baling press. Since it is considered by all parties in this action that no creditor between June 18, 1961, and June 26, 1961, acquired by attachment or levy a lien upon the baling press, the trustee does not represent any class of people who are named in Wisconsin Statutes sec. 122.05.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 14715 SEPTEMBER TERM, 1964—JANUARY SESSION, 1965

IN THE MATTER of
ROSENBERG IRON & METAL CO., INC.,
Bankrupt

DEMPSTER BROTHERS, INC.,
Petitioner-Appellant,

v.

MILTON M. COHN,
Trustee in Bankruptcy,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

FEBRUARY 5, 1965

Before CASTLE, KILEY, and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* This appeal presents a question of interpretation of section 70(c) of the Bankruptcy Act, 11 U.S.C. § 110(c).[1] Rosenberg Iron & Metal Co., Inc., a Wisconsin corporation located in Milwaukee, is the bankrupt; Milton M. Cohn is the trustee; and Demp-

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[1] § 110(c) reads in part:
The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists.

ster Brothers, Inc. is a creditor who filed a reclamation petition for property sold under a conditional sales contract. A statement of facts, with emphasis on relevant dates, follows.

May 20, 1958. Dempster Brothers sold Rosenberg a baling press for $94,018.75. The sum of $23,504.95 of the purchase price was paid on delivery; the balance of $70,513.80 was secured by a conditional sales contract. *June 19, 1958.* The sales contract was filed with the Register of Deeds of Milwaukee. *June 27, 1961.* Rosenberg made an assignment for benefit of its creditors under applicable provisions of Wisconsin law. *June 28, 1961.* The circuit court of Milwaukee County issued an order against Rosenberg's creditors enjoining them from further proceedings against the company. *October 18, 1961.* An involuntary petition in bankruptcy was filed against Rosenberg. *November 3, 1961.* The company was adjudicated a bankrupt and Cohn appointed trustee. During the ten-day period, *June 18, 1961* (the three-year expiration date of the filing of the conditional sales contract), and *June 28, 1961* (the date of the injunction), certain firms and individuals extended credit to Rosenberg for the purchase of goods. These debts remained unpaid on the date of bankruptcy. Some of these creditors also had extended credit to Rosenberg prior to June 18, 1961; others had not. After filing proof of claim for the balance owing on the conditional sales contract, Dempster filed a petition to reclaim its baling press. The referee denied the petition. On review, the district court affirmed. This appeal followed.

The question is whether the trustee had rights to the baling press superior to Dempster's rights by virtue of section 70(c) of the Bankruptcy Act. Petitioner contends that though it failed to refile the conditional sales contract

with the Recorder of Deeds on or before June 18, 1961, the original filing was constructive notice to the world beyond the three-year filing period. Petitioner further contends that by reason of the state court injunction there were no creditors who could have obtained a lien on the baling press by legal or equitable proceedings at the date of bankruptcy and that therefore the trustee had no rights under section 70(c).

Rights of the trustee as a lien creditor under section 70(c) of the Bankruptcy Act are determined by state law. *Porter* v. *Searle*, 228 F.2d 748 (10th Cir. 1955); *In re Kellett Aircraft Corp.*, 173 F.2d 689 (3d Cir. 1949). The State of Wisconsin has adopted the Uniform Conditional Sales Act. Under the Wisconsin statute a conditional sales contract must be refiled periodically after the initial filing in order to be valid against creditors who, without notice of the contract, have attached or levied on the property.[2] The Wisconsin supreme court has interpreted this statutory provision as follows: "A failure to refile a conditional sales contract destroys its validity only as to subsequent purchasers and creditors. It does not operate to invalidate the contract as to those whose rights during the

[2] Wisconsin Statutes, § 122.05, reads in part:

(1) Every provision in a conditional sale reserving property in the seller, shall be void as to any purchaser from or creditor of the buyer, who, without notice of such provision, purchases the goods or acquires by attachment or levy a lien upon them, before the contract or a copy thereof shall be filed as provided in this chapter, unless such contract or copy is so filed within 10 days after the making of the conditional sale.

Wisconsin Statutes, § 122.11, reads in part:

The filing of conditional sales contracts provided for in sections 122.05 . . . shall be valid for a period of 3 years only. . . . The validity of the filing may in each case be extended for successive additional periods of one year from the date of renewal by filing with the register of deeds, . . a statement signed by the seller, showing that the contract is in force and the amount remaining to be paid thereon.

three years following the filing were subordinate to the conditional sales contract." *American Mach. Co.* v. *Larson,* 217 Wis. 208, 257 N.W. 608 (1934).

It is conceded that Dempster did not refile its conditional sales contract and that the three-year filing period expired June 18, 1961. Unquestionably, then, the initial filing could not operate against those who extended credit to Rosenberg after that date. We agree with the referee that the trustee under the provisions of section 70(c) acquired as of October 18, 1961,[3] the status of a creditor who without notice of the conditional sales contract extended credit to Rosenberg after June 18, 1961, and then obtained by levy or attachment a lien upon the baling press, and that this is so regardless of whether such a creditor actually existed.

It is true, as petitioner says, that under Wisconsin law the filing of a conditional sales contract is equivalent to actual notice and is constructive notice to the world. *Commercial Credit Corp.* v. *Schneider,* 265 Wis. 264, 61 N.W. 2d 499 (1953). It is clear from the *American Laundry* case, however, that constructive notice ends with the three-year period unless there is a valid refiling with the Register of Deeds.

Petitioner argues that because of the injunction in the state court proceeding no creditor, actual or hypothetical, existed at the date of bankruptcy, October 18, 1961; further, that under the doctrine of *Lewis* v. *Mfrs. Nat'l Bank of Detroit,* 364 U.S. 603 (1961), the trustee could not "reach back" to the period between June 18 and June 28, 1961 (from the end of the three-year filing period to the

---

[3] "While § 70(c) speaks of 'the date of bankruptcy,' that term is defined as 'the date when the petition was filed.' Section 1(13), 11 U. S. C. § 1(13)." *Lewis* v. *Mfrs. Nat'l Bank of Detroit,* 364 U.S. 603, 607, n.5 (1961).

date of the injunction), and assert that a creditor could have attached or levied on the baling press during that period. We disagree. While it is perhaps true that a creditor of Rosenberg who became such after June 18, 1961, could not have acquired a lien by legal or equitable proceeding during the existence of the injunction (the termination of which coincided with the bankruptcy adjudication), there was no impediment to such acquisition during the ten-day period preceding the injunction. *Lewis* is distinguishable because the "anterior point of time" before bankruptcy, to which the Supreme Court referred, was the period between the date a loan secured by a chattel mortgage was made to the bankrupt and the date when the chattel mortgage was recorded. In the instant case, the relevant period of time is posterior to the expiration of the three-year filing period of the conditional sales contract. If the petition for bankruptcy had occurred on June 28, 1961 (the date of the injunction), there could be no doubt that the trustee would prevail because he would have assumed at that time the status of a lien creditor who had acquired his lien without notice of the conditional sales contract. As we view it, the fact that an injunction intervened from June 28 to November 3, 1961, should have no material effect. The injunction merely froze the rights of Rosenberg's creditors from June 28 until the trustee succeeded to those rights by virtue of section 70(c).

As the district judge noted in his decision, the trustee need not prove that a creditor coming within the purview of section 70(c) actually exists at the date of bankruptcy. This section applies even on a hypothetical basis. *Lewis* v. *Mfrs. Nat'l Bank of Detroit,* 364 U.S. 603 (1961). A fortiori, the denial of the petition of reclamation was proper in the instant situation because two creditors,

Hein-Werner Corporation and National Salvage Company, who had not extended credit to the bankrupt during the three-year filing period, did extend credit to it between June 18 and June 28, 1961.

It would appear that the district judge ruled that the petition should be denied not only under the provisions of section 70(c), but also under section 70(e)(1) of the Bankruptcy Act. Since we are of the opinion that there was adequate basis for denying it under section 70(c), we do not reach the question of whether the other section also applies.

The order is affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

(Note: The material crossed off in the last three lines on page 22 and the first four lines on page 23 conforms to the deletion in the Certified Decision of the Seventh Circuit Court of Appeals filed with this case.)

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

April 30, 1965

Before

Hon. LATHAM CASTLE
Hon. ROGER J. KILEY
Hon. LUTHER M. SWYGERT

IN THE MATTER OF ROSENBERG IRON & METAL CO., INC. DEMPSTER BROTHERS, INC.

No. 14715 vs.

MILTON M. COHN

It is ordered that the opinion in the above cause, issued on February 5, 1965, be amended in the following respect. The last sentence in the paragraph beginning at the bottom of page 4 and continuing on the top of page 5 of the opinion shall be deleted, this sentence reading: "A fortiori, the denial of the petition of reclamation was proper in the instant situation because two creditors, Hein-Werner Corporation and National Salvage Company, who had not extended credit to the bankrupt during the three-year filing period, did extend credit to it between June 18 and June 28, 1961."

Having issued the above order, the court denies the petition for rehearing.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. 402

In The Matter of
Rosenberg Iron & Metal Co., Inc.,

Bankrupt.

DEMPSTER BROTHERS, INC.,

Petitioner

vs.

MILTON M. COHN, Trustee in Bankruptcy,

Respondent.

**On Petition For Writ Of Certiorari To
The United States Court Of Appeals For The Seventh Circuit**

BRIEF FOR RESPONDENT IN OPPOSITION

IRVIN B. CHARNE
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Attorney for Respondent,
Milton M. Cohn, Trustee
in Bankruptcy

HAMMERSMITH-KORTMEYER CO. MILWAUKEE

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IN THE

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Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals For The Seventh Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

(1) Is the decision of the Seventh Circuit Court of Appeals in the case at bar contrary to the decision of this Court in the case of *Lewis v. Manufacturers National Bank of Detroit,* 364 U.S. 630, 81 S. Ct. 347 (1961)?

(2) Is the decision of the Seventh Circuit Court of Appeals in the case at bar in conflict with the decision of the Ninth Circuit Court of Appeals in the case of *Pacific Finance Corporation v. Edwards,* 304 F. (2d) 224 (9th Cir. 1962)?

ARGUMENT

I.

The decision of the Circuit Court of Appeals is not contrary to the decision of this Court as set forth in Lewis v. Manufacturers National Bank of Detroit, 364 U.S. 630, 81 S. Ct. 347 (1961)

In support of its petition for a writ of certiorari, the appellant asserts that the Seventh Circuit Court of Appeals in arriving at its decision in the case at bar, ruled contrary to the holding in *Lewis v. Manufacturers National Bank of Detroit,* 364 U. S. 630, 81 S. Ct. 347 (1961). In support of this argument, appellant cites extensively from the *Lewis* case and then goes on to state, at page 6 of its brief, that:

> "The trustee in the case at bar is attempting to reach back to the period of June 19, 1961, to June 26, 1961, and claim that during this eight day period of non-recordation a creditor of Rosenberg Iron & Metal Co. could have obtained a lien and, therefore, the trustee on October 18, 1961, the date of bankruptcy, is clothed with the power of such a creditor and his status as of June 19, 1961, to June 26, 1961.
>
> This position advocated by the trustee and approved by the Circuit Court of Appeals is contrary to the holding in *Lewis v. Manufacturers National Bank of Deroit,* 81 S. Ct. 347."

We respectfully submit that the position as set forth above by the appellant is not the position of the trustee nor was it the basis of the Court of Appeals decision. If we, for the sake of analysis, disregard the existence of the state court restraining order, then it is clear

that a hypothetical lien creditor as of the date of bankruptcy could have obtained a lien superior to that of Dempster Brothers, Inc. because of Dempster Brothers' failure to refile its conditional sales contract in accordance with the provisions of Section 122.11, Wis. Stats. (1961). The appellant takes the position that by reason of the existence of the state court's restraining order, no creditor, actual or hypothetical, could have obtained a lien as of the date of bankruptcy. Therefore, the appellant reasons, the court's holding that the trustee by virtue of 70(c) takes a position superior to that of Dempster Brothers means in essence that the trustee can reach back to the period subsequent to the time the filing lapsed but prior to the time of the state court restraining order.

While the Court of Appeals did distinguish the case at bar from the *Lewis* case on the factual basis that the anterior point of time referred to in the *Lewis* case was the period between the date the loan secured by the chattel mortgage was made and the date the chattel mortgage was recorded, whereas the anterior point of time in our case was posterior to the expiration of the three-year filing period, the distinction made was not necessary to the Court's decision, nor does it imply any deviation from the holding of the *Lewis* case. On page 503 of its decision, the Court stated:

> "It is conceded that Dempster did not refile its conditional sales contract and that the three-year filing period expired June 18, 1961. Unquestionably, then, the initial filing could not operate against those who extended credit to Rosenberg after that date. We agree with the referee that the trustee under the provisions of section 70(c) acquired as of October 18, 1961, the status of a creditor who without notice of the conditional sales contract extended credit to Rosenberg after June 18, 1961, and then obtained

> by levy or attachment a lien upon the baling press, and that this is so regardless of whether such a creditor actually existed."

From the foregoing language, it is apparent that the Court's decision is premised upon the proposition that a creditor who had a lien as of the date of bankruptcy would have had lien rights superior to those of Dempster Brothers and, therefore, the trustee is vested with such lien rights pursuant to Section 70(c) of the Bankruptcy Act.

We think it significant to note that although the appellant contends that the state court's restraining order precludes the trustee from exercising the rights vested in him pursuant to Section 70(c) of the Bankruptcy Act, it has failed to cite any authority in support of its contention or any authority setting forth the effect of a state court's restraining order on the rights granted the trustee in bankruptcy. While the respondent has also been unable to locate any authority on these points, we believe that certain observations concerning the power of a state court receiver and the power of the bankruptcy trustee would be helpful in resolving this issue.

A state court receiver is granted almost identical rights under Sec. 128.18(1), Wis. Stats. (1961) as are granted to the trustee in bankruptcy under Sec. 70(c). Section 128.18(1), Wis. Stats. (1961), provides:

> "Claims which for want of record or for other reasons would not have been valid liens as against creditors of the debtor armed with process, pursuant to which said property has been attached or levied upon, shall not be liens against the estate."

Pursuant to the provisions of Sec. 128.18(1), Wis. Stats. (1961), the state court receiver would have enjoyed rights

superior to those of Dempster Brothers, Inc. See *In Re Adams Machinery, Inc.*, 20 Wis. (2d) 607, 123 N.W. (2d) 558 (1963).

The position advanced by the appellant means that the conditional sales contract would be void as to the receiver under Wisconsin law and also void as to the trustee under Section 70(c) of the Bankruptcy Act if a state court receiver had not been appointed but, because of the appointment of the state court receiver and the issuance of a restraining order, the trustee lost his rights under Section 70(c). Such a determination would result in an inequitable treatment of creditors and be contrary to the very equitable nature of these proceedings. Furthermore, holding that the appointment of the state court receiver and the entry of a restraining order deprived the trustee of his rights under Section 70(c), and also deprived all creditors of their rights, would mean in essence that the appointment of the state court receiver, the entry of the restraining order and the subsequent adjudication of bankruptcy perfected the lien of Dempster Brothers, Inc. as to subsequent creditors and as to the trustee; something which Dempster Brothers, Inc. could not have done itself under Wisconsin law. Such result would not be in keeping with the rationale of Section 70(c).

II.

No Conflict exists between the Decision of the Seventh Circuit Court of Appeals and that of any other Court

The appellant also alleges in its brief in support of its petition for a writ of certiorari, that the decision of the Court of Appeals in the case at bar is contrary to the decision of the Ninth Circuit Court of Appeals in the case of *Pacific Finance Corporation v. Edwards,* 304 F.

(2d) 224 (1962). In the decision in the *Pacific Finance Corporation* case, the Ninth Circuit Court of Appeals held that the trustee could not exercise the powers given to him in Section 70(c) of the Bankruptcy Act unless there was an actual creditor in existence at the time of bankruptcy who could have obtained such a lien. The appellant takes the position that the state court restraining order in the case at bar precluded any creditor from obtaining such a lien and, therefore, the decision that the trustee by virtue of Section 70(c) takes a lien superior to that of Demptser Brothers, is contrary to the decision of the Ninth Circuit Court of Appeals in the case of *Pacific Finance Corporation v. Edwards,* 304 F. (2d) 224 (1962).

The appellant in raising this contention does not allege that there was no actual creditor in existence who might have obtained a lien. What the appellant does allege is that the state court restraining order would have prevented such a creditor from obtaining a lien and therefore there was not an actual creditor in existence who could have obtained a lien as of the date of bankruptcy. We submit that the appellant is attempting to extend the holding of the *Pacific Finance* decision beyond what was decided in that case. That case did not require more than that an actual creditor exist who under a hypothetical situation could obtain a lien of the type described in Section 70(c). It did not take into account the ability or inability of an actual creditor to perfect the lien by reason of valid or invalid court orders, State legal holidays on the date of bankruptcy, or other procedural impediments which an actual creditor might encounter. In order to argue that a conflict exists between the Seventh Circuit and the Ninth Circuit, it is necessary to show that there was no actual creditor in existence who under ideal con-

ditions could have obtained a lien superior to Dempster Brothers, Inc. as of the date of bankruptcy.

On page 12 of its brief, the appellant admits that there was a creditor in existence who extended credit to the bankrupt subsequent to the time when the filing of the conditional sales contract lapsed. The appellant, however, contends that the mere existence of such a creditor is not sufficient and that the burden of proof is upon the trustee to show that such creditor had no knowledge of the reservation of title by Dempster.

It is the trustee's position that in Wisconsin the burden of proof to show that a creditor who extended credit to the bankrupt subsequent to June 18, 1961 had notice of the conditional sales contract is upon the appellant, Dempster Brothers, Inc., and that the appellant has failed to sustain this burden. Appellant cites the case of *In Re Douglas Lumber Company,* 2 F. (2d) 985 (1924) in support of its position. The *Douglas Lumber Company* case is distinguishable from the case at bar. In the *Douglas* case the Supreme Court of Wyoming held that under a Wyoming law the burden of proof was upon the person claiming against the vendor to show that he did not have notice. Therefore, by reason of the wording of the Wyoming statute, the District Court was constrained to follow the Wyoming law on this matter. Such is not the law in Wisconsin. In the case of *New Dells Lumber Company v. Pfiffner,* 216 Wis. 638, 258 N.W. 375 (1935), a conditional seller brought an action against a conditional buyer and his mortgagee to recover the value of certain sleighs. The Court, in discussing the question of whether the evidence established that the mortgagee had notice of the agreement reserving title in the vendor, stated at page 644:

> "We think it clear that, unless it be shown that a purchaser . . . had actual knowledge of such facts

> as would put a prudent man upon inquiry, which, if prosecuted with ordinary diligence, would lead to actual notice of the right or title in conflict with that which he is about to purchase, a conditional sale contract would be void as to him."

It can be seen from the language of the Court that the Court contemplated that the burden of proof would be upon the vendor of the conditional sales contract to show that a subsequent purchaser or creditor had notice of the said contract.

The appellant also cites as authority for its position the concurring opinion in the case of *In Re Masters Knitting Corporation,* 7 F. (2d) 11 (2nd Cir. 1925). The majority opinion disagreed with the concurring opinion on the question of the burden of proof and held, at page 12:

> "Let it be assumed that, if all the creditors of this bankrupt knew that this sale was conditional, the petitioner below should prevail; it remains true that the trustee has the right of any creditor and the burden of proof is on the conditional vendor to prove no creditor was without notice."

From the foregoing it can be seen that there was an actual creditor in existence who could have obtained a lien superior to that of Dempster Brothers, Inc. Since there was an actual creditor in existence who under Wisconsin law could have obtained a lien subsequent to the date when the filing period lapsed, the decision of the Court of Appeals in the case at bar is not contrary to the holding of the Ninth Circuit in *Pacific Finance Corporation v. Edwards.*

Finally, on pages 15, 16 and 17 of the appellant's brief, the appellant appears to argue that since failure to refile a conditional sales contract destroys its validity only as to subsequent creditors who have obtained a lien without notice of the existence of the conditional sales contract, and since there is no such lien creditor in existence, the trustee is not vested with the rights of a lien creditor pursuant to Section 70(c) of the Bankruptcy Act.

While it is true that there is authority to the effect that there must be an actual creditor in existence on the date of bankruptcy who could have obtained a superior lien in order for the trustee to be deemed vested with such a lien by virtue of Section 70(c), there is no authority that there must be an *actual* lien creditor in existence. The decision in *Pacific Finance Corporation v. Edwards,* 304 F. (2d) 224 (9th Cir. 1962), at page 228 stated:

> "Under our construction of §70, sub. c the trustee is empowered to exercise the powers given him even if no actual creditor has obtained a lien, but he cannot do so if no actual creditor could have obtained a lien."

CONCLUSION

Respondent respectfully submits that for the reasons heretofore set forth, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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in Bankruptcy